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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable William H. Alsup, Judge

SONOS, INC., Plaintiff, VS. GOOGLE LLC, Defendant.	**NO. C 21-07559 WHA**
GOOGLE LLC, Plaintiff, VS. SONOS, INC., Defendant.	**NO. C 20-06754 WHA**

San Francisco, California
Thursday, February 24, 2022

TRANSCRIPT OF PROCEEDINGS

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CSR No. 7445, Official United States Reporter

APPEARANCES: (CONTINUED)

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Thursday - February 24, 2022 **8:39 a.m.**

P R O C E E D I N G S

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THE COURT: Okay. Let's go to Sonos v. Google.

THE CLERK: Calling Civil Action 21-7559, Sonos Incorporated versus Google LLC and related cases.

Counsel, please state your -- please approach the podium and state your appearances for the record, beginning with counsel for plaintiff.

MR. VERHOEVEN: Good morning, Your Honor.

MR. de BLANK: Good morning, Your Honor. Bas de Blank for plaintiff Sonos.

MR. VERHOEVEN: Okay. I thought we were the plaintiff, Your Honor.

But this is Charles Verhoeven for Google.

THE COURT: Thank you. Good morning.

All right. This is a motion by --

MR. VERHOEVEN: By Google --

THE COURT: -- by you --

MR. VERHOEVEN: -- to dismiss --

THE COURT: -- to dismiss their second amended complaint on willfulness.

MR. VERHOEVEN: Yes, Your Honor.

THE COURT: All right.

MR. VERHOEVEN: And indirect infringement.

THE COURT: All right. Please go ahead.

MR. VERHOEVEN: Thank you, Your Honor.

This is a relatively simple motion. We have moved on three of the patents that have been asserted. It's undisputed in the papers.

Let me identify those three patents for the record. The '033, the '966, and the '885 patents are the ones we're moving on.

It's undisputed that prior to the draft complaint that was sent to us ten hours before the suit was filed, that Google had not received notice of any of those three patents. It's undisputed. And based on that undisputed fact, Your Honor, they cannot have a claim for willfulness.

Now, they've made some arguments about this that I think I'll address briefly. One is, they point -- they say: No, no. We gave you notice because we sent you a bunch of patents, and some of those patents relate to the patents that we're suing you on.

And, Your Honor, the law is very clear. You have to identify the specific patent in order to provide notice. It's not sufficient, Your Honor, to identify a patent that was a parent of the patent or a patent that was a continuation of the patent. You have to identify the specific patent in order to provide notice.

That's the whole point of willfulness is you have prior

notice so that you can alter your behavior, but you don't, and you willfully infringe. That's the whole point of it.

So sending a notice of 50 patents that don't include the patent you intend to sue on is the opposite of notice. It's misleading.

And that's what happened in this case, Your Honor. There has been no notice. And it's undisputed.

So that's why I say it's a simple motion. Under the law, failure to provide notice prior to the suit means you can't allege willfulness.

THE COURT: Well, let me give you a fact hypothetical. Let's say that -- put aside the pleadings for a moment. Let's say somebody just brings an ordinary patent infringement case and discovery proceeds. And during the course of discovery, the defendant accused infringers, files are looked at, and inside one of the files is a memo dated a year before suit in which the alleged infringer says, "You know, this '813 patent, I think we infringe this, and here's why, and maybe we should change our design a little bit. It'd be easy to design around." But they don't do it, and so that's in the files.

MR. VERHOEVEN: Okay.

THE COURT: Now, that would be clear-cut willful infringement, or at least a jury could so find; and yet, it's not pled. So what would we do in a situation like that?

MR. VERHOEVEN: A motion to amend based on newly

discovered facts that indicate that there was notice, prior to the filing of the complaint, of the patent, just like you would --

THE COURT: When you say "notice," you mean knowledge.

MR. VERHOEVEN: Knowledge.

THE COURT: Knowledge.

MR. VERHOEVEN: Thank you.

THE COURT: All right.

MR. VERHOEVEN: Knowledge of the patent and intent.

But that was not -- that was something discovered through discovery, and the appropriate mechanism is a motion to amend. Just like -- every single case alleges willfulness. In this case, frankly, I now know the reason the plaintiffs sent us the complaint ten hours before filing is so they can now say we had pre-suit notice. I thought they were being nice.

THE COURT: Okay. Maybe that's true. But, wait.

Now, if I grant your motion, will that then affect -- how will they ever get into your files to find out -- you would be saying: Oh, Judge, you threw out the willfulness claim; therefore, they don't get to take that discovery.

So don't they get to take discovery into willfulness?

MR. VERHOEVEN: Not if they don't have a Rule 11 basis to allege it, Your Honor.

THE COURT: Then how are they ever going to find that memo?

MR. VERHOEVEN: How are they -- I mean, the way that this works under Rule 11 is, you can't file a complaint to create a claim. If there's no willfulness evidence before you file the complaint, you have no Rule 11 basis to allege willfulness. And if you later discover facts that indicate that there's willfulness, you file a motion. You address the Court with it.

THE COURT: What I'm worried about is that you would use your victory on the pleadings to stonewall discovery so that they can't ever find the information that would show willfulness in your own files.

MR. de BLANK: Your Honor, they don't have -- you can't shoot first and aim later. That's not the way the court system works. At least it shouldn't work that way.

And what we have here is a complaint that was filed, and it's undisputed that three of the patents had no more than ten hours' notice before the complaint was filed.

And the willfulness -- one of the problems in our patent system, Your Honor, is everybody alleges willfulness and every defendant alleges inequitable conduct. And 90 percent of the time, they go away by trial. And it's just abuse of the system when there's no factual predicate on which it's based.

THE COURT: Well, you yourself filed, before they filed, a declaratory relief in which you specifically alleged that you did not infringe. So you must have had time to do your Rule 11 homework.

MR. VERHOEVEN: Yes.

THE COURT: You had to do a complete analysis --

MR. VERHOEVEN: Yes.

THE COURT: -- to be able to say: We know the claims; we know what our product is; we've analyzed the situation.

So you've admitted everything there except infringement. But you've admitted knowledge of the patent, pre-suit knowledge of the patent, and pre-suit adequate time to do your homework to see if you infringe. No?

MR. VERHOEVEN: Your Honor --

THE COURT: See?

MR. VERHOEVEN: -- just because we're able --

THE COURT: No. Okay. I want you to -- I think that's a tough problem for you.

Go ahead.

MR. VERHOEVEN: Okay. Let me just address it this way. It's a red herring.

The issue is, does ten hours' notice provide sufficient notice -- from a draft complaint, provide sufficient notice under the law for a claim of willfulness?

And Your Honor's own decisions, as well as many other decisions of this court, say no. You can't create a cause of action by sending someone a complaint, Your Honor.

And that's the only basis they have, is to say, "We sent them a complaint ten hours beforehand."

Think about the purpose of willfulness, Your Honor. The whole purpose of a notice requirement is to encourage the parties not to have litigation, not to have infringement, to avoid knowingly infringing each other. So you give notice and you try to work it out ahead of time.

Now, ten hours before a complaint is filed is specious along those lines. It's not a notice to try -- and think about it. Can Google change its products in ten hours, Your Honor? Can Google meet and confer in ten hours to avoid willfulness? Of course not.

This whole "I'm filing ten hours before the complaint so, therefore, technically, it's pre-suit" is a meaningless argument that ignores the purpose of the notice requirement. And frankly, if it's allowed, then everybody's going to be sending complaints ten hours before they file them and then say they have notice.

I mean, the draft complaint itself that they sent us to create the notice already said we had notice, Your Honor. So --

THE COURT: All right. Okay. Time is short here. Hold that thought.

MR. VERHOEVEN: Okay.

THE COURT: Just stick with the points Mr. Verhoeven has made about why didn't you send a letter, what was the notice, and aren't you just arguing that the notice was sent less than

24 hours ahead of time.

MR. de BLANK: Thank you, Your Honor. Just a couple of points to respond to that.

First, the notice was sent a day in advance; and that was clearly --

THE COURT: Did you really expect that they would change their product in 24 hours?

MR. de BLANK: We hoped that they would reach out to us. And if they had, instead of filing -- rushing off to file a DJ action, picked up the phone and said, "Hey, we got your complaint. We now take this seriously. Let's have a meaningful discussion and let's all hold off," we would have had that discussion.

THE COURT: No. You said in your own letter, you were about to file the very next day.

MR. de BLANK: And that was because our concern was that if we gave them more time, they would do exactly what they did, which is race off to file a DJ action.

But if they had picked up the phone and if they had said, "We got your complaint. We would like to discuss it," we would have --

THE COURT: Why didn't you --

MR. de BLANK: -- had that discussion.

THE COURT: -- send a letter about three months ahead of time, saying, "Here's how you infringe"?

MR. de BLANK: Your Honor, if we had given them three months' notice, then they would have done exactly what they did in --

THE COURT: What's wrong with that? Are you saying that we're somehow a bogus court here in the Northern District?

MR. de BLANK: Not at all, Your Honor.

THE COURT: Well, then why are you saying that you get to choose -- you get to go to Waco, Texas -- "Waco, Texas" -- but they can't come to the Northern District, where they live and work and where your firm is, by the way?

MR. de BLANK: Yes.

THE COURT: So there's something about our court that you don't like.

MR. de BLANK: No, Your Honor, not at all.

THE COURT: Yes, it is. What is it about our court that Sonos does not like?

MR. de BLANK: No, that is not -- that is not at all the case, Your Honor.

Sonos made the choice to file suit in Texas because it had jurisdiction and venue over the dispute in Texas. There was --

THE COURT: Not just Texas. Waco, Texas.

MR. de BLANK: Yes, in Waco Texas, Your Honor, because there was jurisdiction and venue in that case -- in that forum.

THE COURT: Well, there was jurisdiction here.

MR. de BLANK: That's true, Your Honor. There's jur- --

THE COURT: You could have filed here.

MR. de BLANK: We could have, Your Honor. There is jurisdiction in a great number of places.

THE COURT: Uh-huh.

MR. de BLANK: And you're right. Sonos made the --

THE COURT: You still could have given notice and you didn't. And it's an important function to give notice so that these cases don't -- so that it's not a game like you're playing here.

A game: Waco versus San Francisco. Then it goes up to the Federal Circuit. It wastes so much time. These patent lawyers, you're just wasting the Court's resources with these kind of fights, and it could have been resolved possibly with a notice letter.

All right. Okay. That's my main point. But that's his main point, and I see a lot of merit in that point. So I'm going to shut up and let you respond. Go ahead.

MR. de BLANK: Thank you, Your Honor. So a couple points to respond to the amount of notice.

First, we're talking about the second amended complaint. That complaint was filed February 23rd, 2021. By the time that second complaint -- amended complaint was filed which has the willfulness allegation Google is seeking to dismiss, Google had had notice of the '033 and '966 patents for over five -- sorry -- for almost five months and had notice of the '855

patent for over six weeks.

During that time, Google has continued to engage in the specific conduct that was identified in the complaint and alleged to be infringing. Google had --

THE COURT: Is this in the pleading?

MR. de BLANK: Yes, Your Honor. In the second amended complaint, we include the claim charts identifying the infringement.

THE COURT: You're saying for one of these patents, that they had six weeks' notice?

MR. de BLANK: So there was an original complaint that was filed on September 28th, 2020. The day before that complaint is when -- the notice that Google's attorney is referring to.

Since then, there's been a first amended complaint and now a second amended complaint.

The second amended complaint is the operative pleading. That's the complaint that they're seeking to dismiss the willfulness allegations from.

That second amended complaint was filed February 23rd. And at the time that we filed the second amended complaint, they had had almost five months' notice for the '033 and '966, and over six weeks' notice for the '855, and continued to engage in the infringing activity. That is notice. And that is, the continuing conduct is the allegation -- the basis for the allegation of willfulness. But --

THE COURT: Help me on this. That's a good point.

So you're saying that, okay, even if you can't bootstrap the original complaint to be notice, the original complaint did give notice; and then, when the second amended complaint is filed many months later, they've been on notice for -- how many months? Five?

MR. de BLANK: Almost five months for the '033 and '966, and over six weeks for the '855.

THE COURT: All right. So what does the law say on that point? Does it, quote, relate back to the original date? Or is it just taken that "Okay, you've been on notice for five months that you're infringing; this is willful"? Is that good enough? Is there a case on this point?

MR. de BLANK: Well, Mr. Verhoeven was the one who suggested that if we had developed evidence of willfulness, we would file an amended complaint alleging willfulness.

We have filed an amended complaint alleging willfulness, and the evidence of that willful conduct is set forth in the amended complaint. That's the motion -- the complaint they're seeking to discuss.

THE COURT: I know, but --

MR. VERHOEVEN: May I address that, Your Honor?

THE COURT: No, not yet.

I'm asking you a question. What is the best case you have on whether that scenario works for alleging willful -- is this

in the face of -- there's some cases out there that say you can't bootstrap your way into willfulness by alleging it in the complaint. A complaint can't create rights. It asserts rights, but it can't create rights.

So you must have some authority that goes against that. What do you say?

MR. de BLANK: Yes, Your Honor. We are not saying that the complaint creates the rights.

What we're saying is we gave them advance knowledge even before the first complaint.

They're saying that that was not sufficient time with respect to the first complaint.

And what I'm saying is, it was -- we think it was. We think the case law is clear that they had actual notice of the conduct that was in advance of the complaint that was filed. We think that is more than sufficient.

But even if it weren't, it certainly is sufficient to support the willfulness allegations in the second amended complaint which was filed months later.

THE COURT: That's your argument. Give me a decision by the Federal Circuit or some court that I would be willing to follow that says that the notice itself can come from the courtesy copy 24 hours ahead and then plus the five months.

MR. de BLANK: Sure. So certainly, Your Honor, in the context of notice for indirect infringement -- which I believe

is the same type of notice as is required for willfulness -- knowledge of the actual activity leading to the claim, there is the decision in *Skyworks*, which we cited in our brief.

THE COURT: Sky what?

MR. de BLANK: *Skyworks*.

THE COURT: All right. Tell me what happened there.

MR. de BLANK: Yes. Let me get the cite.

So in that case, there was a first complaint filed in Massachusetts. That complaint was dismissed for lack of jurisdiction in Massachusetts, and three days later, it was refiled in the Northern District.

And the Northern District Court concluded that the -- sorry. Let me get the quote for you.

(As read):

"The knowledge required may be satisfied by showing actual knowledge or willfull blindness."

And then the Court continued, quote (as read):

"Courts in the Northern District of California have held that knowledge of a patent based on the filing of a complaint is sufficient to meet the knowledge requirement for an induced infringement claim. Accordingly, Skyworks has shown Kinetic USA's actual knowledge of the patents-in-suit from the filing of the complaint in the Massachusetts litigation."

And that's *Skyworks Solutions Incorporated v. Kinetic Technologies Incorporated*, Northern District, in March 2015.

THE COURT: Okay.

MR. VERHOEVEN: May I address --

THE COURT: Hold that thought.

What do you say to that decision?

MR. VERHOEVEN: First off, Your Honor, what they're saying -- it's not like they filed an amendment that added pleadings -- added additional statements about this. They're saying our notice is because they sued us five months ago. And they simply filed an amended complaint.

This is the same tactical stuff as filing -- giving someone a copy ten hours ahead of time. They're manufacturing a willfulness claim based on their own complaint, and that is not allowed, Your Honor.

Pre-suit -- the cases that find that -- for example, the *MasterObjects* case is a case you ruled on, Your Honor. That's one case where you found -- you denied a motion like this because the defendant -- there was evidence the defendant had cited to the exact patent five times in his patent prosecution histories and that it had knowledge of it prior to that time. So you allowed it.

The other two times you looked at this issue, there was no such evidence, and you granted the motions to dismiss,

Your Honor.

THE COURT: You're not answering the *Skyworks* --

MR. VERHOEVEN: Okay. *Skyworks* goes to a different issue. Okay? So *Skyworks* goes to the issue of post-complaint conduct.

And so let me just separate this out really clearly, Your Honor. There's no dispute, I don't think, among the parties that if there's no pre-suit notice, you can't allege willfulness or indirect infringement pre-suit.

There's a split of authority, Your Honor, that has not been resolved by the Federal Circuit as to whether you can allege post-suit indirect infringement.

And Your Honor's got three opinions that I found, none of which address a split of authority.

So I recommend to the Court to look at -- there's two cases, Your Honor, where judges have carefully looked at this issue of the post-suit conduct. And if I can just have one second to get them.

The *ZapFraud v. Barracuda* case -- no, I think I have the wrong one. Just one second, Your Honor.

Yeah. *ZapFraud v. Barracuda*, this is a case before Judge Connolly in Delaware. The cite is 528 F.Supp.3d 247. And Judge Connolly carefully goes through all of the cases and the split of authority. This is a decision in 2021. And he analyzes the split, looks at the cases on both sides, and concludes (as read):

". . . that the complaint itself cannot be the source of the knowledge required to sustain claims of induced infringement . . . ," post-complaint.

And there's another case, another recent decision by Judge Gary Klausner in the Central District of California, ***Ravgen v. Quest***. And I can only give you the Westlaw cite because it's January 18th, 2022. The Westlaw cite -- or it's 2:21-cv-09011. And I can provide the Court with a copy later, if the Court wants a copy of that.

But there also, Judge Klausner analyzed the split and comes out the same way. You can't use -- you can't manufacture -- I'm so sorry, Your Honor. I've got to stop waving my hands. You can't manufacture a claim through your pleadings. You just can't do it.

If you -- if you're saying -- you can't say -- you can't sue somebody and say, because you sued them, they have willful knowledge. You have to have more than that. You can't sue somebody and have no pre-suit knowledge and say they're intentionally inducing people because I sued them.

That is not consistent with -- well, at least in light of these two judges' opinions, that's not consistent with the law. Why? They looked at the fact that willfulness is a punitive doctrine. And if you could just -- and it should be used sparingly. And if you can simply amend your complaint and allege willfulness, everybody's going to allege willfulness.

It's going to open the floodgates.

Number two, they found that a complaint cannot create a cause of action. And post- -- if you don't have any other facts besides the complaint, you can't allege post-suit indirect infringement or willfulness.

Under FRCP 8 and 11, the plaintiff must have a good faith basis for alleging infringement at the time of filing, not based on post-suit conduct.

And it's impossible for someone to file a complaint, there's no notice, and have the defendant have any other source of the cause of action except the complaint itself.

THE COURT: All right. I need to bring it to a close.

MR. VERHOEVEN: Okay, Your Honor.

THE COURT: I understand your point. I want to give this side --

MR. VERHOEVEN: I just want to say one thing we didn't address. It's in the papers.

There's another requirement for willfulness, which is you have to plead egregiousness. And they said you don't. But if Your Honor looks at the case law, you'll see there's one judge in this district who found you don't. Every other case that I found says that you do.

THE COURT: Says you do what?

MR. VERHOEVEN: You do have to plead egregious conduct. And there's no pleading of that sort in their complaint for

willfulness.

THE COURT: All right. You get the last word. Go ahead.

MR. de BLANK: Thank you, Your Honor.

Google keeps saying that the complaint itself cannot be the basis of notice. And that's not the facts that we have here. Everyone agrees that there was at least a day before the complaint was filed where there was actual notice; and before the second amended complaint, there's a much longer period of time. We have pled that. We have pled that notice.

We have pled that in the second amended complaint, that they've continued their behavior and they're still doing the infringing actions.

Now, what Google has never responded to was Your Honor's hypothetical at the beginning about how we would get that memo showing that they had the actual knowledge and intentionally infringed the patent. And that goes to the other basis of willfulness, which is that they -- the allegation in the complaint that they were willfully blind, and that can also be a basis of notice.

So we have pleaded the facts sufficient for the Court to conclude that Google was willfully blind to these patents because of the protracted negotiations between the parties, the fact that we identified patents in the same families, that we accused the same products of infringing, that we told Google that we were continuing to prosecute patents in those families,

and that these patents then issued in those families.

Now, once we gave them the notice --

THE COURT: But, listen, I'm going to say one thing for absolutely sure.

Putting somebody on notice of a family is not enough.

MR. de BLANK: I'm not --

THE COURT: The law should never go that far. That is crazy. You've got to say: Here's the patent, and here's the claim that you infringe.

MR. de BLANK: I understand, Your Honor. And I'm not saying that putting them on notice of the families is itself sufficient for willfulness.

What I'm saying, though, is that once we sent them the copy of the complaint, they had, in less than a day, according to themselves, fully analyzed the patents, concluded that they did not infringe, also, I believe, concluded that the patents were invalid, and filed a DJ action for that.

And there's one of two possibilities that could allow that. One is that Google was already aware of those patents. The memo Your Honor suggested exists, that there is something where Google was monitoring those patent families because of the notice that Sonos provided and Google had actual knowledge.

The other option is that Google ignored the suggestions by Sonos that it monitor these families, that they infringe patents in these families, and chose not to look for those

patents. And that would be willful blindness.

And in either case, that could be a basis to extend even further the date of knowledge and the date of beginning of willful infringement. But at a minimum, the date of the willful infringement began when we gave them notice of the patents and notice of the infringement allegations prior to filing suit.

THE COURT: All right. Under submission.

MR. de BLANK: Thank you.

MR. VERHOEVEN: Thank you, Your Honor.

(Proceedings adjourned at 9:07 a.m.)

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CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

DATE: Monday, February 28, 2022

Ana Dub, CSR No. 7445, RDR, RMR, CRR, CCRR, CRG, CCG
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